poration which had acquired, by consolidation, eighty per cent of the business of manufacturing harvesting machinery and certain other farmers' implements, should be dissolved, although prices had not been raised unreasonably by the defendant, and it had acquired its dominant position almost entirely through business efficiency, since no one of the acts designated as unfair competition could be attributed to it for at least seven years past. The court, Sanborn, J., dissenting, ordered a dissolution, on the ground that the suppression of competition between the six large and influential companies of which defendant corporation had been formed, was in unreasonable restraint of trade among the States. The decision can be supported only on the ground that the unlawful acts committed by the defendant, seven years ago, justified the inference of its intent to resume these methods in the future. Size and dominant position may be said to raise a presumption of baneful possibilities, but proof of fair methods, and an intent to continue those methods, inferable from past performances, tends to override such presumption.[24]

PIPE LINES AS COMMON CARRIERS.—A public service company may be created voluntarily or compulsorily: voluntarily, where, as in the case of a common carrier, there is an actual undertaking and holding out to carry on a certain business with all indifferently;[1] compulsorily, where there is no such undertaking, but where the great interests of the public give a particular trade a public character,[2] and so, as Lord Hale said of such trades, they become "affected with a public interest, and they cease to be *juris privati* only."[3] The latter doctrine is of more recent application and has lately found expansion in the case of *German Alliance Insurance Co.* v. *Lewis*.[4]

Legislative control of a public service business may be supported upon the theory either that the particular business owes its existence to governmental sanction,[5] or, on the other hand, that the welfare and great interests of the public make such control imperatively necessary.[6] Apparently, the first prerequisite to a valid exercise of legislative control is that there must exist intercourse with others which is to be the subject of regulation; that is, there must be a business before there can be a

[24]See 25 Harvard Law Rev. 31, 52; United States *v.* St. Louis Terminal (1912) 224 U. S. 383, 395; *cf.* Standard Oil Co. *v.* United States, *supra*, p. 75.

[1]Browne, Carriers, 43; Gisbourn *v.* Hurst (1710) 1 Salk. *249.

[2]See Munn *v.* Illinois (1876) 94 U. S. 113, as a typical illustration of this class. Any business in which there is a virtual monopoly may be said to be of this character. 1 Wyman, Public Service Corporations, §§ 1, 156.

[3]Hargrave's Law Tracts, De Portibus Maris, 78. This dictum formed the basis of the decision in Munn *v.* Illinois, *supra*. The business referred to by Lord Hale was one which existed purely at the sufferance of the crown, and so that decision extends somewhat the application of this dictum.

[4](1914) 233 U. S. 389. In this case, a statute of Kansas providing for the regulation of rates of insurance companies, was sustained as constitutional. See 14 Columbia Law Rev. 534.

[5]See Cooley, Constitutional Law, 262; 1 Tiedeman, State & Federal Control of Persons & Property, 303; Freund, Police Power, §§ 387-388.

[6]*Cf.* Allnutt *v.* Inglis (1810) 12 East *527; Noble State Bank *v.* Haskell (1911) 219 U. S. 104; Freund, Police Power, § 388.

regulation. No one is compelled to enter business relations with another, and so it would seem that a strictly private enterprise can never, without grave constitutional difficulties, be impressed with the character of a public service company.[7] The authorities show, moreover, that in every case where legislation has been upheld, it has been in connection with occupations that purported to, and really did, come under the head of businesses.

In the regulation of commerce, the power of Congress is subject to the various constitutional limitations imposed upon the federal government. It is evident, too, that in construing the Due Process Clause, the same rule applies to the national government as to the State. Under the police power, it is indisputable that Congress may put partial restraints upon the rights of individuals. It may impose conditions precedent to the exercise of the right to engage in interstate commerce so long as there is a substantial relation between the means adopted and the end sought to be accomplished.[8] So also, it may see that contracts entered into by persons engaged in interstate commerce do not operate as a restraint on commerce,[9] and it may use appropriate means to mitigate harmful results that under certain circumstances inevitably flow from the pursuit of commerce.[10] Indeed, when the public health, morals, or safety, cannot otherwise be adequately secured, it may even absolutely prohibit a deleterious article from the channels of commerce.[11]

There is a distinction, however, between an exercise of the police power and the taking of property for a public use. By the exercise of the police power the owner's use of property is restricted, and this because all property is held subject to the limitations upon its use and enjoyment which a strong governmental necessity may require.[12] But in the latter case, a servitude is imposed upon private property, or the owner is deprived of it entirely, in order that someone else may use it for the benefit of the public. In this event, the Constitution demands that adequate compensation must be given. The importance of the distinction is, that whereas a small and remote public benefit may justify the taking of private property for public use[13] in view of the fact that compensation is always necessarily made, and so the substantial deprivation of private property is thereby appreciably minimized; on the contrary, where there is a material limitation on the use and enjoyment of property under the police power, the governmental necessity must be commensurate with the degree of restriction. Only where the public welfare is vitally involved, therefore, should a serious restriction be sustained.[14]

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[7]McGehee, Due Process of Law, 317, 318; 1 Tiedeman, State & Federal Control of Persons & Property, 302.

[8]See Atlantic Coast Line R. R. *v.* Riverside Mills (1911) 219 U. S. 186.

[9]Addyston Pipe & Steel Co. *v.* United States (1899) 175 U. S. 211.

[10]United States *v.* Delaware & Hudson Co. (1909) 213 U. S. 366.

[11]Lottery Case (1903) 188 U. S. 321; see also in this connection, Hoke *v.* United States (1913) 227 U. S. 308.

[12]See Munn *v.* Illinois, *supra,* pp. 126, 133.

[13]*Cf.* Jones *v.* North Georgia Electric Co. (1906) 125 Ga. 618, 626. Mr. Justice Lamar, dissenting in German Alliance Insurance Co. *v.* Lewis, *supra,* p. 419, based his dissent upon the failure of the Court to observe this difference.

[14]*Cf.* Adair *v.* United States (1908) 208 U. S. 161.

In the recent case of *United States* v. *Ohio Oil Co.* (1914) 234 U. S. 548, an act of Congress making all persons engaged in the transportation of oil, common carriers, was sustained in regard to a company which was engaged in transporting its own oil only. The fact that in the operation of pipe lines the defendant was a gigantic monopoly, weighed heavily with the Court, and constitutional consideration dwindled away to an almost negligible quantity. The practical result of the decision was to give the defendant the choice of serving the public in a capacity in which it did not pretend to serve, or of going out of business.

A monopoly is not *malum in se*.[15] The conception of all property rights is founded upon a kind of monopoly. Under common law principles, the legislative authority may zealously protect free competition from the abuse of monopoly.[16] However desirable in a given case this end may be, the Constitution puts rigid limitations upon the means employed to bring about the result. The defendant should not be made to give the use of its property to others solely because of a monopoly in the property.[17] It is true that under the circumstances of the case, the defendant's business became affected with a public interest; but inasmuch as it was not engaged in transporting oil for others as a business, under the principles previously observed the essentials of a public service company are lacking.[18] The act, therefore, in compelling it to serve the public as a common carrier of oil, would seem to be appropriating its property to a public use. A serious objection to this, however, is that no compensation is made for the taking, since the taking consists in depriving the defendant of the right to the exclusive use and enjoyment of its property and enterprise, and the value of this to the owner is not to be measured by the value of any specific service it is made to render on any particular occasion in the capacity of common carrier. On the other hand, is this regulation a proper exercise of the police power? The defendant must either devote its property to the public use without compensation or give up entirely a private undertaking of an interstate nature. While Congress may prohibit absolutely a noxious article of commerce from interstate trade, should it be allowed to go so far as to say that interstate commerce can be totally barred to an enterprise in itself legitimate and not to be condemned as injurious to the public health, morals, safety, or immediate welfare, where economic adjustment, however desirable, is its only object? That the circumstances of the defendant's business presented an ideal case for legislation can scarcely be questioned, and the Court's decision, in sustaining this particular legislation, might be defended on the ground of imperative necessity. But economic necessity must not become a substitute for constitutional amendment; the right of amendment itself presupposes that there will be cases where legislation, however desirable and however necessary, will fall within the ban of the Constitution.

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[15]See Freund, Police Power, 349; Prentice, Federal Power Over Carriers And Corporations, 158-160.

[16]1 Wyman, Public Service Corporations, § 29.

[17]See Weems Steamboat Co. etc. *v.* People's Co. (1909) 214 U. S. 345; *cf.* dissenting opinion in Budd *v.* New York (1892) 143 U. S. 517, 551.

[18]*Cf.* 2 Kent, Commentaries, *340; see 1 Tiedeman, State & Federal Control of Persons & Property, 296.